In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-81

DANIEL JOHN COCHRAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that evidence of his disappearance was improperly admitted into evidence; that statements made following the incarceration of several co-conspirators were not in furtherance of the conspiracy; that a person who listened to a telephone conversation on an extension telephone should not have been allowed to identify the person whom he overheard; that a transfer between co-conspirators is not a transfer within the meaning of the Marijuana Tax Act; and that an indictment for a violation of the Marijuana Tax Act must allege a transfer of contraband.

Petitioner and several others were charged with conspiracy to acquire, transport, and conceal marijuana, in violation of 26 U.S.C. (1964 ed.) 4741-4744 (Count One); importation of marijuana, in violation of 21 U.S.C. (1964 ed.) 176a (Count Two); and transfer of marijuana,

in violation of 26 U.S.C. (1964 ed.) 4742(a) (Count Three).[1] Petitioner and two co-defendants, Register and Hornsby, were convicted after jury trials in the United States District Court for the Northern District of Georgia.[2] Petitioner was sentenced to a term of five years' imprisonment on each count, the term on Count Two to run consecutively to concurrent terms on Counts One and Three. The court of appeals affirmed in an opinion on which we rely (496 F. 2d 1072; Pet. App. A).[3]

The facts of the case are not in dispute, and were briefly summarized by the court of appeals (Pet. App. A, p. 3A):

> Register, Hornsby and Cochran, along with several others, organized and funded a scheme for flying a large amount of marijuana in from Jamaica. Unfortunately for them, Gilmore Sims, the pilot recruited for the job, informed the Bureau of Narcotics and Dangerous Drugs, enabling its agents to infiltrate the conspiracy thoroughly at an early stage. As testified to by undercover agents and co-conspirators who turned state's evidence, appellants provided funds and made arrangements for Sims to fly to Jamaica, pick up approximately 3,250 pounds of marijuana, and return.

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[1]The Marijuana Tax Act, 26 U.S.C. 4741-4744, and the Marijuana Importing Statute, 21 U.S.C. 176a, were repealed by the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. 801, *et seq.*, effective May 1, 1971. The acts alleged in the indictment occurred during 1970.

[2]Register was tried separately and found guilty on each count of the indictment.

[3]The court of appeals affirmed the convictions of each appellant on all three counts of the indictment. Judge Gee, however, dissented from the court's affirmance of Counts One and Three (Pet. App. A, p. 2A).

Petitioner was arrested after the flight was completed.

1. Petitioner contends that evidence of his disappearance after he learned of a drug raid on his apartment should have been excluded (Pet. 16-19). The court permitted Kim Smith, a teenager who was babysitting for petitioner's eight-month old daughter, to testify that petitioner disappeared after she told petitioner that his apartment had just been raided.[4] The court of appeals acknowledged the limited probative value which should be given ambiguous evidence of flight. "The problem is that any sense of guilt which prompted [petitioner's] actions might have been unrelated to the smuggling conspiracy here charged" (Pet. App. A, p. 6A). However, it correctly concluded "that, properly instructed, the jury was fully capable of appreciating that fact" (*ibid.*).

The court added (Pet. App. A, p. 7A):

> The jury instruction did not overemphasize the relevance of * * * [petitioner's] abrupt departure. To the contrary, it placed the evidence in its proper perspective. The jury was cautioned:
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> > * * * In your consideration of the evidence of flight or concealment, you should consider that there may be reasons for this which are fully consistent with innocence—such as the fear of apprehension, unwillingness to confront the police, or other matters. And a feeling of guilt may not necessarily reflect actual guilt; but, as I say, evidence of intentional flight or conceal-

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[4]This drug raid, conducted by the Georgia Bureau of Investigation, was on another drug charge not related to the federal seizure earlier in the day (Pet. App. A, p. 6A).

> ment is a fact which, if proved, may be considered by you the jury in the light of all the other evidence of the case in determining guilt or innocence of the accused.

For what it was worth, the evidence of flight was properly placed before the jury.

2. Petitioner contends that the trial court improperly admitted hearsay statements made by co-conspirators (Pet. 11-16). Petitioner asserts that because the incarceration of three co-conspirators put an end to the conspiracy the statements could not be in furtherance thereof. The court of appeals described the challenged statements as follows (Pet. App. A, p. 8A):

> Richard Dimarzo, who was arrested with defendants Register and Hornsby, testified over objection that the day following their arrest Register's wife visited them in jail and Register asked her if * * * [petitioner] had been arrested. Also over objection, undercover agent William Terry Fernandez was permitted to testify that on October 21, eleven days after the drug seizure and the arrests of Register and Hornsby, he visited Jerome McNally, subsequently arrested for his organizational role in the conspiracy, at his office, at which time McNally asked him about his contacts in Jamaica and told him that he was certain * * * [petitioner] and Register would attempt to bring out more marijuana.

Although statements made after the termination of a conspiracy are not admissible against co-conspirators, *Dutton* v. *Evans*, 400 U.S. 74, the court of appeals correctly ruled (Pet. App. A, pp. 8A-9A) that:

> if co-conspirators still at large are fully capable of perpetuating an on-going conspiracy, it is entirely possible that they or their arrested brethren may make statements intended to further effectuate the conspiracy. *United States* v. *Sarno*, 456 F. 2d 875 (1st Cir. 1972).

The court found that the questioned statements were made in furtherance of and during the life of the conspiracy (Pet. App. A, p. 9A):

> Here, there was evidence that the overall conspiracy was still active after Register and Hornsby were arrested. Dimarzo testified that within eight days of the arrests, while he was still confined in a cell with Register and Hornsby, they wrote a letter and asked him to look it over. The letter requested one Gene Wheeler to get up one thousand dollars and take it to a man named Jim Stephens at the airport who would know how to take care of bringing in more marijuana. Dimarzo also stated that Wheeler later came to the jail window and told them that he did not have one thousand dollars and that, because of their arrests, Stephens was leery of doing anything more. Dimarzo further testified that, after Hornsby got out on bond some thirty-four days after their arrests, Register told him that Hornsby would have marijuana to sell to raise money for their bonds.
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> The preceding evidence indicates that an on-going conspiracy continued at least up to, and including, the alleged statement by McNally to Fernandez that Register and * * * [petitioner] would be importing more marijuana. There is little doubt that this statement was intended to be in furtherance of the

> general conspiratorial scheme. The earlier question by Register to his wife concerning * * * [petitioner] is somewhat more problematical. It can, however, be inferred that Register was interested in * * * [petitioner's] being free to generate bond money from the criminal enterprise.

3. Petitioner contends that the district court improperly permitted a government undercover agent to testify about a telephone conversation to which he listened on an extension phone (Pet. 19-22). The court of appeals described the circumstances of the telephone call as follows (Pet. App. A, p. 4A):

> Undercover agent Richel testified that, after an initial aborted run to Jamaica, he was on an extension phone when the pilot Sims called Register, asked him why the marijuana was not delivered to the Jamaican airport as planned, and said that he needed more money if they wanted him to make another trip. Richel related that Register responded that furnishing additional money was not up to him but gave Sims the name and telephone number of "the money man"—Danny Cochran, at 404-252-8489. Richel further testified that he remained on the extension while Sims presumably dialed the number given, asked for Danny Cochran, and heard a male voice answer, "I am Danny." When Sims said that he had been referred by Register, the man identifying himself as Cochran said that he or his representative would meet Sims at the airport when the marijuana arrived and pay Sims ten thousand dollars and ten dollars a pound. No objection was made to the authentication of this voice as Cochran's, and none would have been sustainable.

The number given was listed in the phone book to petitioner. The person who answered the phone identified himself as "Danny" and conversed, in his role, to a co-conspirator knowledgeable about his identity. This was sufficient to permit the jury to consider the evidence. *Van Riper* v. *United States*, 13 F. 2d 961, 968 (C.A. 2).

4. Petitioner contends (Pet. 22-26) that his conviction on Count Three should be reversed because it is not possible for co-conspirators to "transfer" marijuana within the meaning of the Marijuana Tax Act. Petitioner did not move at trial to strike Count Three on this ground. Moreover, petitioner did not challenge on appeal his conviction under Count Three. He therefore cannot appropriately challenge it here. *Lawn* v. *United States*, 355 U.S. 339, 362-363 n. 16. We believe in addition that the definition of "transferee" has insufficient continuing importance, in light of the repeal four years ago of the Marijuana Tax Act, to warrant plenary consideration by this Court.

In any event, we submit that the court of appeals reasonably construed the statute. The statutory definition includes "*any* type of disposition resulting in a change of *possession*," 26 U.S.C. (1964 ed.) 4761(4) (emphasis added), with the exception of transfer to a common carrier. The definition is very broadly phrased. Even if co-conspirators are viewed as "partners" and "agents" of each other, as petitioner urges, they are at most agents for purposes of ownership of the contraband. The statute, however, taxes transfers of possession, not transfers of ownership. And

> [t]he fact that Congress saw fit to exclude as a taxable event transfer to a common carrier is at least suggestive that all other changes in possession were within the congressional intent. [Pet. App. A, p. 23A.]

There is no sound reason to read the statute to punish as a crime ordinary transfers among individuals, while exempting transfers of possession among co-conspirators. To give it the reading petitioner suggests would grant an unwarranted boon to those "wise" enough to add to criminal transfers a criminal conspiratorial agreement.[5]

5. Petitioner finally contends (Pet. 26-28) that his conviction under Count One should be reversed because the indictment charged a violation of 26 U.S.C. (1964 ed.) 4744 which *Leary* v. *United States*, 395 U.S. 6 has held unconstitutional, and because the count charged "transport[ation]" rather than "transfer" of marijuana. Because the sentence under Count One runs concurrently with the sentence under Count Three, this Court need not address this claim. *Benton* v. *Maryland*, 395 U.S. 784; *Barnes* v. *United States*, 412 U.S. 837, 848 n. 16. Nor is the contention persuasive. Count One charged violations of 26 U.S.C. (1964 ed.) 4741 through 4744. The trial court struck Section 4744 from the indictment and did not charge the jury under Section 4744; consequently petitioner could not have been convicted in violation of *Leary* v. *United States*, *supra*. The indictment charged in the statutory terms, and specifically referred to the four sections. This was sufficient to apprise petitioner that he must defend himself against a charge of conspiring to violate Section 4742, which penalizes transferors. Cf. *Minor* v. *United States*, 396 U.S. 87.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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[5]Petitioner argues (Pet. 25-26) that if conspirators may "transfer" marijuana among themselves he must be a transferee. *Leary* v. *United States*, 395 U.S. 6, would preclude the conviction of a transferee. The court of appeals concluded, however, that petitioner was both a transferor and a transferee within the conspiracy, and that he aided and abetted both acts. If petitioner's "agency" theory is adopted, then he, as the "money man" in the conspiracy, was the principal of the "transferors."